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No. 84-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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December 10, 1984

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The petitioner has identified two important questions presented for review by this Court. First, should the judicial power of the United States be used to coerce the petitioner to violate foreign criminal laws and the explicit injunction of a foreign court? Second, in the circumstances of this case, is a "civil" contempt fine of $1,825,000 punitive?[1] The *amici*—the Governments of Canada, the United Kingdom and the Cay-

[1] If the order of contempt was issued in contravention of law, as the petitioner and the *amici* maintain, then the assessment of the fine was necessarily improper. If the underlying contempt order is sustained, review is nevertheless necessary, as the magnitude and duration of the fine in the present circumstances remains an egregious departure from the accepted and usual course of judicial proceedings.

man Islands, and the Canadian Bankers' Association—who participated in this case before both the district court and the Eleventh Circuit, have advanced "special and important reasons" why certiorari should be granted.

In contrast, the respondent's brief in opposition discloses no "matter or ground why the cause should not be reviewed by this Court." *See* Sup. Ct. R. 22.1. The respondent does not contest the importance of the questions raised. It argues that the questions should be ignored as "fact-bound," or, if the respondent's reconstruction of the facts is substituted for the record, that the questions can be evaded. However, the respondent's argument proceeds on the basis of a contorted presentation of the record and baseless factual inferences. Moreover, the respondent fails to reply to a variety of reasons for granting review that are advanced by the petitioner and the *amici*.[2]

I. THE ORDER OF CONTEMPT SHOULD NOT HAVE ISSUED

The Bank has presented for review the question of whether a neutral non-party witness may properly be held in civil contempt for obeying applicable foreign criminal laws and foreign court orders which bar the production of documents subpoenaed from abroad.[3] The respondent does not challenge the

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2 The current practice of international law in the United States requires foreign governments that find it necessary to comment on U.S. litigation to participate as *amici*. *See Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae* at 9, n. 19 and accompanying text.

3 The respondent slurs the Bank's status as a neutral party in this matter. *Brief for the United States in Opposition* ("Res. br.") at 9, n. 4. The Bank has always sought to assist the government in resolving conflicts created by cross-border subpoenas and to expedite the grand jury process in a lawful manner. *See Brief Amicus Curiae of the Bank of Nova Scotia, Ghidoni v. United States*, 732 F.2d 814 (11th Cir.), *cert. denied*, 53 U.S.L.W. 3324 (U.S. Oct. 29, 1984) (No. 84-270) (*amicus* briefs filed by the Bank supporting the United States in both the Eleventh Circuit and this Court).

importance of that recurrent question. Instead, the respondent suggests, on the basis of a casual and unsustainable interpretation of a relatively uncomplicated factual record, that the question does not exist in this case. The respondent's conclusion is the illogical product of flawed reasoning.

On October 20, 1983, the district court issued a contempt order, and imposed a daily fine of $25,000, to commence on October 26. Appendix E.[4] The fine was stayed by the Eleventh Circuit until November 14, 1983. Appendix A at 4a. Months later, by its order of February 28, 1984, the district court assessed a fine of $1,825,000 against the Bank, covering the period of November 14, 1983 through January 25, 1984. Appendix B at 16b.

The respondent's illogical argument that foreign law issues are not implicated in this case improperly relies on events occurring *after* the contempt order was issued. But the validity of the October 20 contempt order must be reviewed on the basis of the facts and circumstances that existed when the order was issued, and not those of months later. *See ITT Community Development Corporation v. Barton*, 569 F.2d 1351, 1352 (5th Cir. 1978). It is uncontested that when the order was issued, the Bank was barred by provisions of both Bahamian and Cayman criminal law, as well as the order of the Grand Court of the Cayman Islands, from releasing the subpoenaed documents. Appendix N. Those prohibitions were not lifted until several weeks later: on November 14, with respect to Bahamian law, and on November 17, after the fine had begun to accrue, with respect to Cayman law. The sufficiency of the Bank's search for documents in the Bahamas was not an issue in the district court prior to the issuance of the contempt order, or even prior to the November 14 effective date of the fine. The sole basis for the contempt order was the Bank's assertion of foreign law as a sufficient impediment to compliance with the subpoena. That issue is therefore before this Court, in this case. The respondent's contention to the contrary is specious.

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4 Citations in this form are to the Appendices to the Petition for a Writ of Certiorari.

Equally specious is the respondent's attempt to render Cayman law irrelevant. As the bar of Bahamian law was lifted before accrual of the fine, and documents from the Bahamas were produced, the issue of the conflict between U.S. and Bahamian law became moot. But the conflict between U.S. and Cayman law remained a live controversy, as the Bank was unable to produce Cayman documents until four days after the fine began to accrue. The Eleventh Circuit clearly recognized the existence of that controversy. *See* Appendix A at 16a-20a.

The respondent disparages the applicability to this case of the Court's decision in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) ("*Rogers*"). In *Rogers*, this Court recognized that the "fear of criminal prosecution constitutes a weighty excuse for non-production" of documents from abroad. 357 U.S. at 211. The respondent hints that such "fear" cannot be an excuse in this case because the Bank ultimately escaped prosecution. *See* Res. br. at 11. However, the record is completely clear that as of the time the order was issued the serious risk of prosecution existed not in one country, as in *Rogers*, but in two. The record is also clear that when the risk of prosecution was eliminated, responsive documents were immediately produced by the Bank. *See* Appendix A at 4a-5a.

In a further effort to avoid the application of the holding in *Rogers*, the respondent recites the statements of the district and circuit courts that the petitioner did not exercise good faith in attempting to comply with the subpoena. But it is just that conclusion which is the principal flaw in the decisions below. "Good faith" remained undefined, appearing to turn only on whether the witness achieves success in producing the documents, notwithstanding that production would necessitate criminal offenses in allied nations. Strenuous efforts in every jurisdiction, calculated only to procure the lawful release of the documents, were accorded no weight when measured against the "non-standard" seemingly applied to the petitioner and to others similarly situated. While the respondent may be

content with that state of legal disarray, this Court should not tolerate perpetuation of the existing confusion. The need for a precise declaration is especially important, given the accelerating incidence of "cross-border" subpoenas. *See* Petition at 10-11.

The respondent has addressed a similarly unpersuasive argument to the existing conflict in the circuit courts. In *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the Seventh Circuit refused to compel the disclosure of documents, sought pursuant to an IRS summons, from Greece. Greek criminal law barred the release of such documents. Strangely, the respondent attempts to distinguish the inconsistent holding in the Seventh Circuit case on a basis that the respondent itself then repudiates: that one case involved a grand jury subpoena and the other an IRS summons. *See* Res. br. at 14, n. 11. The other distinctions raised by the respondent are of little moment in the context of the issues raised by this case. *See* Petition at 12-15. The point remains clear: the Seventh Circuit excuses production where foreign criminal law interferes; the Eleventh Circuit does not.

The interests of the *amici* have been demonstrated by their appearance in the courts below and their participation in this Court. Expression of these views to the executive branch is no longer appropriate and would, moreover, be meaningless in view of the fact that the executive branch's use of judicial power raises an essential issue in the case. When the propriety of exercising judicial power is in issue, the executive stands before the court as does any other litigant. Here, the respondent has failed to answer many of the reasons articulated by the petitioner and the *amici* for granting a writ of certiorari. The *amici*, including the governments of three close allies, have vigorously expressed their disagreement with the decisions below, but their views have received cursory dismissal from the respondent. For example, the Government of Canada has argued that the necessary meaning of the Eleventh Circuit decision is that an alien owes the United States a greater duty

of obedience than is owed to its own national government or to its host sovereign, even with respect to conduct outside of the United States.[5] *Brief of the Government of Canada as Amicus Curiae in Support of Petition for Writ of Certiorari* ("Can. br.") at 3.

Further, the *amici* have pointed out that established principles of international law prohibit one state, acting on the basis of the presence within its borders of a foreign national, from coercing disobedience of the applicable laws of another state. Can. br. at 3. The *amici* also point out that the decisions below conflict with analogous federal court decisions that excuse compliance with a grand jury subpoena when to do so would violate state law. *See, e.g., In re Hampers*, 651 F.2d 19 (1st Cir. 1981); *In re Cruz*, 561 F.Supp. 1042 (D. Conn. 1983); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F.Supp. 537 (D.N.J. 1982). These and other points are unanswered in the respondent's brief. The respondent has shown no "matter or ground" why these issues should not be reviewed and resolved by this Court.

The petitioner and the *amici* have identified an important issue. The dilemma of conflicting legal obligations facing a witness in the Bank's position is a matter affecting international relations, as the presence of the *amici* makes clear. It is more than a matter of one bank and one subpoena. Yet, on the flimsiest of grounds, respondent seeks to preclude review.

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5 In its argument, the respondent overlooks the express holding of the district court that the interest of the Cayman Islands in its criminal law is "vital." Appendix B at 14b. Without citation, the respondent proclaims its interest "superior." Res. br. at 12, n. 8; *see* § 40 of *Restatement (Second) of Foreign Relations of the United States* (1965).

II. THE FINE IS PUNITIVE

Following months of extensive, and ultimately successful, multi-national efforts by the Bank to comply with the subpoena in a lawful manner, the Bank was further burdened with a fine of $1,825,000. The respondent hopes to avoid review of the assessment of that fine, which bursts the limits of civil contempt, on the basis of the catch-words "fact-bound." However, uncontested evidence establishes that the fine was primarily punitive, in derogation of the purpose of civil contempt.

It is uncontested that by November 17, 1983, the Bank had produced documents from both the Cayman Islands and the Bahamas. Following additional searches, the Bank produced more documents on December 5, 1983. The December 5 production ended the period during which either party thought any documents remained outstanding.[6] As of that date, at the latest, the fine ceased to be coercive, and lost its character as a civil contempt fine. In late January 1984, the Bank found and produced four additional documents, which were carbon copies of previously produced documents, with slightly different markings that furnished no new information. *Compare* Appendix A, at 6a, with 9a. The Bank was fined $1,825,000, of which $1.3 million related solely to the four carbon copies.

Substantial compliance with the purgation conditions of civil contempt ends civil contempt. *Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union*, 531 F.2d 617 (D.D.C. 1976). The uncontroverted evidence shows that the production of the four carbon copies provided no new information. Accordingly, the Bank had substantially complied no later than December 5, and its civil contempt—if any—had ended.

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6 The respondent states that on December 12, 1983 they disagreed with the Bank's assertion that production was complete. Res. br. at 17. That more documents existed cannot be inferred from the respondent's unwillingness during an oral argument to concede compliance. At no time after December 5, 1983 did the respondent question the completeness of the Bank's production.

Furthermore, regardless of the degree of compliance, the taking of all reasonable steps to comply with a contempt order ends the contempt. *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976). The Bank searched repeatedly until no documents were thought to be outstanding. The fine may not continue after a party has taken such steps.[7]

The Federal Rules of Procedure prohibit the imposition of contempt penalties on a party that has an adequate excuse for non-compliance. Fed. R. Civ. P. 45(f); Fed. R. Crim. P. 17(g); *see* Appendices J, K. The Bank, having made an extensive search and having no knowledge of undiscovered documents, clearly had an adequate excuse for not continuing to search. Assessment of civil contempt fines after that time deprives petitioner of due process and is thus prohibited by law. Unless corrected, the decision below would abolish the distinction between civil and criminal contempt.

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7 The respondent misstates the record regarding the availability of a Bank representative to appear before the grand jury to authenticate the documents produced. Res. br. at 17. The record clearly reflects that the Bank's representative was available at all times after December 5. Record Excerpts Vol. II, tab B at 60.

CONCLUSION

The decisions below fail to identify any standard of conduct for the recipient of a subpoena calling for the cross-border production of documents. Furthermore, these decisions suggest that no amount of effort by a subpoena recipient can constitute "good faith" or furnish an "adequate excuse" with respect to the non-production of documents subpoenaed from a jurisdiction barring their release. If the law is that instant and perfect obedience to subpoenas is required, without regard to the penal consequences in other nations, that precept should be unambiguously articulated so that neutral record-keepers and others can appropriately conform their behavior.

The Court's intervention is also required to insure that the lower courts do not exceed the limits of their powers by imposing harsh and punitive fines in the guise of civil contempt.

Accordingly, this petition for certiorari should be granted.

Dated: New York, New York
December 10, 1984

Respectfully submitted,

/s/ Henry Harfield

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CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed Reply Brief in Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit have been served this ____ day of December, 1984, by mail, postage prepaid, upon the following counsel:

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